

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY -4 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0005-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
THOMAS BERNARDO GRANILLO,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054476

Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Higgins and Higgins, P.C.  
By Harold Higgins

Tucson  
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Thomas Granillo seeks review of the trial court’s order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Granillo was convicted after a jury trial of armed robbery, aggravated assault with a deadly weapon, aggravated assault of a minor less than fifteen years of age, and possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to a combination of concurrent and consecutive mitigated prison terms totaling 21.5 years. We affirmed his convictions and sentences on appeal. *State v. Granillo*, No. 2 CA-CR 2006-0343 (memorandum decision filed July 7, 2008).

¶3 Granillo filed a notice and petition for post-conviction relief arguing, *inter alia*, that his trial counsel had been ineffective in failing to properly advise him regarding the state’s plea offer and his rejection of that plea therefore was involuntary. After an evidentiary hearing, the trial court found that Granillo’s counsel had inadequately communicated with him about the plea offer and that he had been prejudiced by counsel’s deficient performance. The court, however, rejected Granillo’s request that it order the state to reinstate the plea offer, and instead set aside Granillo’s convictions and ordered a new trial. Granillo did not seek review of that decision, instead accepting a new plea offer and pleading guilty to aggravated assault with a deadly weapon and aggravated assault of a minor under the age of fifteen. The trial court sentenced him to consecutive prison terms totaling fifteen years.

¶4 Granillo filed a new notice and petition for post-conviction relief, arguing the trial court was required to reinstate the original plea offer. He also asserted that, in the event the court found he had waived that claim, Rule 32 counsel “and/or subsequent

trial counsel” had been ineffective in “fail[ing] to challenge and preserve the trial court’s ruling for post conviction relief.” The court summarily denied relief, concluding the first trial court did not abuse its discretion in ordering a new trial rather than ordering the state to reinstate the first plea offer. In his petition for review, Granillo asserts the court was required under these circumstances to order the state to reinstate the plea offer. He also reurges his argument that his first Rule 32 counsel and second trial counsel were ineffective for failing to preserve his claim that the plea offer must be reinstated.

¶5 Although the trial court discussed the merits of Granillo’s claim that the first trial court erred in failing to order the state to reinstate the plea offer, we agree with the state that Granillo is precluded from raising this claim pursuant to Rule 32.2(a)(2). *See also State v. Sainers*, 196 Ariz. 20, ¶ 15, 992 P.2d 612, 616 (App. 1999) (reviewing court need not deny relief on same basis as trial court). That claim was finally adjudicated in his first Rule 32 proceeding, and Granillo opted not to seek review of the ruling denying his request that the plea offer be reinstated. *See* Ariz. R. Crim. P. 32.9(c) (“party aggrieved” by “final decision of the trial court on the petition for post-conviction relief” must file petition for review “[w]ithin thirty days after the final decision of the trial court”). Granillo has cited no authority, and we find none, suggesting he may raise that claim in a subsequent petition for post-conviction relief.

¶6 And we find no merit to Granillo’s position that he nonetheless is entitled to relief because either his first Rule 32 counsel or his second trial counsel were ineffective in failing to preserve this issue. To prevail on a claim of ineffective assistance of counsel, Granillo must show his counsel’s conduct fell below prevailing professional norms and that conduct prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Granillo does not identify how his second trial counsel could have preserved this claim,

much less how his failure to do so would fall below prevailing professional norms. As we have explained, the proper method to seek review of the trial court's decision would have been to file a timely petition in this court. And, even if we characterized Granillo's first Rule 32 counsel's failure to do so as ineffective, Granillo has no constitutional right to the effective assistance of Rule 32 counsel; his claim is not cognizable under Rule 32.<sup>1</sup> *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011).

¶7 For the reasons stated, although we grant review, relief is denied.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

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<sup>1</sup>Granillo noted in his petition for post-conviction relief that he is entitled to the effective assistance of counsel “from . . . counsel representing him on post conviction matters as of right.” Although Granillo is correct, *see State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995), that fact is not relevant here because his first petition for post-conviction relief followed his conviction after a jury trial. Thus, it was not an “of-right” proceeding. *See Ariz. R. Crim. P. 32.1.*